UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY HSUEH,

Plaintiff,

-against-

No. 15-cv-03401 (PAC)

THE NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES a/k/a THE DEPARTMENT OF FINANCIAL SERVICES and ABRAHAM GUEVARA, *Individually*,

Defendants.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT DFS'S MOTION FOR SPOLIATION SANCTIONS AGAINST PLAINTIFF

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Defendant New York State Department of Financial Services ("DFS") respectfully submits this reply memorandum of law and the accompanying Reply Declaration of Eva L. Dietz, dated January 6, 2017 ("Reply Dietz Decl."), in further support of its motion for spoliation sanctions against plaintiff Tiffany Hsueh.

PRELIMINARY STATEMENT

Plaintiff appears to believe that her belated production of an incomplete recording is sufficient to absolve her rampant discovery abuses in this case. This attitude is just further evidence of the little regard she has for her discovery obligations. However, the consequences of plaintiff's blatant and repeated attempts to prevent the disclosure of unfavorable evidence are not so easy to escape.

ARGUMENT

In its moving papers, DFS established that plaintiff is subject to spoliation sanctions because she intentionally deleted a relevant recording while under a preservation obligation. See Memorandum of Law in Support of Defendant DFS's Motion for Spoliation Sanctions against Plaintiff, dated June 13, 2016 ("Mov. Mem."); Declaration of Eva L. Dietz, dated June 13, 2016 ("Dietz Decl."). In its supplemental papers, DFS further established that plaintiff's belated production of a small portion of that recording was insufficient to cure her prior conduct or immunize her from the requested sanctions. See Supplemental Declaration of Eva L. Dietz, dated November 7, 2016 ("Supp. Dietz Decl."); Declaration of Allison Clavery, dated November 7, 2016 ("Clavery Decl."). Plaintiff has entirely failed to combat either showing.

A. The Complete Recording Has Not Been Restored, And Severe Spoliation Sanctions Are Therefore Warranted

Plaintiff does not dispute that she intentionally deleted a relevant recording while under a preservation obligation and thereby committed an act of spoliation.[1] To the contrary, she readily admits that she "should not have deleted the recording of [her] meeting with Allison Clavery" and, accordingly, confirms that "[i]t is undisputed that the recording should not have been deleted." See Hsueh Decl. ¶ 1; Opp. Mem. at 5. Plaintiff nevertheless asserts that the imposition of spoliation sanctions is not warranted because the recording at issue has supposedly been "restored." Opp. Mem. at 4-5. In fact, her argument against sanctions is premised entirely on the supposed restoration of the recording. Id. at 2, 3, 4-5, 6. But repeatedly claiming that the recording "was restored" does not make it so. Indeed, both the facts and the law call for the opposite conclusion.

For example, Plaintiff does not dispute that the meeting she recorded lasted approximately 45 minutes, while the recording she produced lasts only 10 minutes and fails to reflect substantial portions of the meeting. See Clavery Decl. ¶¶ 2-4. It is similarly undisputed, and in fact Plaintiff freely concedes, that the recording cuts off mid-sentence. See Supp. Dietz Decl. ¶ 13 &

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[1] As described in DFS's moving memorandum, severe sanctions for spoliation (such as dismissal and an adverse inference) are warranted when relevant evidence is destroyed and the party responsible acted with a culpable state of mind while under a preservation obligation. Mov. Mem. at 5. Plaintiff's opposition papers do not contest that the recording at issue was relevant, that she purposefully (as opposed to accidentally) deleted the recording, or that the recording was deleted at a time when she was obligated to preserve it. Her statement that there "is an insufficient basis upon which to conclude that Plaintiff deleted the recording with intent to prevent its use in litigation," Memorandum of Law in Opposition to Defendant DFS's Motion for Spoliation Sanctions against Plaintiff, dated December 13, 2016 ("Opp. Mem."), at 5, does not make the imposition of spoliation sanctions any less appropriate. As an initial matter, the applicability of this recently formulated standard to the instant motion is unclear. Mov. Mem. at 8 fn. 2. Moreover, plaintiff's claim of lack of intent is based entirely on the false assertion that "[a]t her deposition, she admitted to making the recording; she did not deny its existence." Opp. Mem. at 5. Much to the contrary, plaintiff initially denied recording any of her meetings with Allison Clavery, responding "No, I don't believe so" and "I don't think so" when asked. See Dietz Decl., Ex. C at 205:11-16. It was only after she was pressed that she finally admitted to making the recording. Id. at 205:17 – 210:24. In any event, DFS has in fact set forth ample basis to conclude that Plaintiff deleted the recording, which severely undermines her allegations in this case, in order to prevent it from being used against her. Mov. Mem. at 9-10; Supp. Dietz Decl. ¶¶ 16-28. Plaintiffs' assertion that she did not make the recording for purposes of this lawsuit, see Declaration of Plaintiff Tiffany Hsueh in Opposition to DFS's Motion for Spoliation Sanctions, dated December 12, 2016 ("Hsueh Decl."), ¶ 2, is similarly belied by the facts. Indeed, she does not dispute that the recorded meeting took place in January 2015, see Clavery Decl. ¶ 2, which is exactly when she hired her attorney in this case. Mov. Mem. at 7. Moreover, she fails to explain how or why the recording would have furthered her professed reason for making it, i.e. "to protect [her] from retaliation." See Hsueh Decl. ¶ 2. In any event, plaintiff need not have made.the recording for purposes of this lawsuit in order to be liable for spoliation sanctions. Mov. Mem. at 5-12.

Ex. 3; Opp. Mem. at 2. As DFS demonstrated in its supplemental papers, plaintiff was entirely unable to explain that fundamental fact. See Supp. Dietz Decl. ¶ 15 & Ex. 4 at 199:6 – 202:9. Her self-serving statement that "[t]he copy of the recording my husband found is a complete copy of the recording" is not supported by any proof whatsoever. See Hsueh Decl. ¶ 5.[2] Moreover, plaintiff's husband, who actually recovered the recording produced by plaintiff, has acknowledged the possibility that only part of the recording was recovered and stated that he cannot be sure it is complete. See Supp. Dietz Decl. ¶ 15 & Ex. 5 at 110:3-14, 112:7 – 113:10.

Given the utter lack of support for her claim that the entire recording was recovered, plaintiff attempts to shift the burden to DFS to prove that the recording is incomplete. Opp. Mem. at 2. But that is not DFS's burden to bear. To the contrary, any doubts about the completeness of the recording must be resolved against plaintiff and in DFS's favor. That is because "[c]ourts almost always possess imperfect information about what, precisely, a party's spoliation has destroyed," which in turn "creates a risk that the Court will err in weighing – and correcting – the effect of the spoliation on the opposing party." Dorchester Fin. Holdings Corp. v. Banco BRJ S.A., 304 F.R.D. 178, 184 (S.D.N.Y. 2014). As a result, "[t]he spoliation doctrine is designed to equitably resolve uncertainties about the nature and scope of lost evidence" and to that end "functions to 'place the risk' of such error 'on the party who wrongfully created the risk.'" Id. (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)). Here, it was Plaintiff who created the risk of error concerning the completeness of the recovered recording by deleting it in the first place. Thus, "[i]n keeping with the principles of the spoliation doctrine," Plaintiff must assume the risk of that error via the conclusion that the recording she produced is incomplete.

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[2] Plaintiff's memorandum also purports to cite her deposition testimony suggesting that her recording device may have run out of space. Opp. Mem. at 3. The excerpted portion is entirely misleading, however, because it omits Plaintiff's admission that this testimony is merely her self-serving "belief" because she does not know and cannot determine how much space the recording device actually had. See Supp. Dietz Decl. ¶ 15 fn. 2 & Ex. 4 at 202:4-9, 260:6 – 261:15. Perhaps that is why Plaintiff chose not to repeat this claim in her declaration.

Id. In any event, for the reasons summarized above and further described in DFS's supplemental papers, there is ample evidence that the recording produced by Plaintiff is in fact substantially incomplete. See Supp. Dietz Decl. ¶¶ 13-15; Clavery Decl. ¶¶ 2-4.

Because Plaintiff has failed to demonstrate that she produced a complete copy of the recording at issue (and, to the contrary, both the available evidence and the spoliation doctrine require the conclusion that she did not), DFS's request for spoliation sanctions should be granted. Specifically, Plaintiffs' claim against DFS should be dismissed or, at the very least, an adverse inference should be imposed.

B. DFS Is Also Entitled To Recover Costs And Attorney's Fees

In addition to the appropriately severe spoliation sanctions described above, DFS has also requested that it be awarded the costs and attorney's fees incurred in making the instant motion and conducting reopened discovery. See Supp. Dietz Decl. ¶ 37. Plaintiff entirely fails to combat the propriety of such an award.

1. Spoliation Motion

Plaintiff's argument with respect to costs and attorney's fees is directed exclusively at those incurred during reopened discovery. Opp. Mem. at 6. Thus, she appears to concede that DFS is entitled to the costs and attorney's fees incurred in making the instant spoliation motion. The Court should grant DFS such costs and fees on that basis alone (and DFS will thereafter submit a supplemental memorandum and supporting documentation detailing the costs and fees incurred).

To the extent that Plaintiff's opposition to the imposition of spoliation sanctions in general is deemed to encompass DFS's request for costs and attorney's fees incurred in making its spoliation motion, Plaintiff has offered no basis to deny such an award. Indeed, as noted in Section A above, Plaintiff's argument against spoliation sanctions is based entirely on the incorrect assertion that the entire recording at issue has been restored. Moreover, Plaintiff's claim that "the initial focus should be on whether the lost information can be restored or replaced," Opp. Mem. at 4, actually cuts in favor of an award of costs and attorney's fees to DFS. That is because plaintiff's own conduct prevented DFS from making such an initial inquiry until well after its spoliation motion had been filed.

Specifically, it is undisputed that plaintiff waited until two days before her opposition to DFS's spoliation motion was due to even attempt to recover the recording (despite repeated prior inquiries from DFS regarding the recoverability of the recording). See Supp. Dietz Decl. ¶¶ 3-5, 29-35. Moreover, based on the aforementioned sequence of events, it is evident that plaintiff would never have attempted to recover the recording if DFS had not made a formal spoliation motion. She actually admitted as much during her deposition, when she explained that she finally made her recovery attempt specifically in response to learning of DFS's spoliation motion. Id. ¶ 31 & Ex. 4 at 196:1 – 197:12. Plaintiff's dilatory conduct more than justifies an award of costs and attorney's fees to compensate DFS for the expenses incurred in making the instant motion. See, e.g., In re WRT Energy Secs. Litig., 246 F.R.D. 185, 201 (S.D.N.Y. 2007) (award of costs and attorney's fees incurred in connection with spoliation motion is "appropriate to punish the offending party for its actions or to deter the litigant's conduct" and also "serves the remedial purpose of making the opposing party whole for costs incurred as a result of the spoliator's wrongful conduct") (citations omitted); Turner v. Hudson Transit Lines, Inc., 142 F.R.D 68, 78 (S.D.N.Y. 1991) (awarding costs and attorney's fees incurred in the "investigation and litigation of the document destruction" where spoliator had, inter alia, "caused the expenditure of additional resources by misleading the plaintiff and the Court regarding the actual disposition of the records").

2. Reopened Discovery

DFS is also entitled to compensation for costs and attorney's fees incurred during reopened discovery. Plaintiff's sole argument in opposition to such an award is that the "vast majority of the discovery focused on [her] past mental health." Opp. Mem. at 6. But even accepting this argument, for the reasons set forth in Section B(1) above, DFS would still need to be compensated for the expenses incurred in litigating the instant motion, which includes those portions of the reopened discovery that do relate to plaintiff's spoliation. See, e.g., Kosher Sports, Inc. v. Queens Ballpark Co., No. 10-CV-2618, 2011 U.S. Dist. LEXIS 86651, at *58 (E.D.N.Y. Aug. 5, 2011) ("direct[ing] plaintiff and plaintiff's counsel to reimburse defendant's reasonable attorney's fees and expenses incurred in litigating that sanction motion [for spoliation], in reopening depositions, and in preparing transcripts of the recordings and reopened depositions on an expedited basis").

In any event, DFS is in fact entitled to compensation for the entirety of the reopened discovery. As plaintiff herself concedes, "the vast majority of the [reopened] discovery focused on Plaintiff's past mental health." Opp. Mem. at 6. But the very fact that discovery had to be reopened in order to obtain this obviously relevant information is ample justification for an award of attorney's fees and costs. Indeed, in light of the fact that plaintiff exclusively seeks damages for emotional distress, DFS had been requesting information regarding her mental health history since the onset of discovery over a year ago. See Reply Dietz Decl., Exs. A-B. Specifically, on December 21, 2015, DFS issued a discovery request for "all documents concerning Plaintiff's physical and/or emotional condition from January 1, 2005 through the present, including but not limited to documents concerning any physical and/or emotional conditions for which Plaintiff was examined, diagnosed, treated or counseled during that period."

Id., Ex. A at Request No. 27. DFS simultaneously asked plaintiff to identify "all physicians, doctors, psychiatrists, psychologists, therapists, counselors, social workers, case workers, or other physical or mental health-care practitioners who have examined, diagnosed, treated or counseled Plaintiff for any physical or mental condition from January 1, 2005 through the present," as well as "all hospitals, clinics or other physical or mental health-care facilities at which Plaintiff has been examined, diagnosed, treated or counseled" during that time. Id., Ex. B at Interrogatory Nos. 6-7. In response to DFS's document request, plaintiff authorized the release of records "from Monika Jamrozek-Burra, LMHC – NY Psychiatric Services," whom she described as "the only provider who has examined, diagnosed, treated or counseled Plaintiff for emotional distress." Id., Ex. C at Response No. 27. Plaintiff identified the same person and facility in response to DFS's interrogatories, and asserted that they pertained to "therapy following Defendant Guevara's sexual harassment." Id., Ex. D at Response Nos. 6-7. Thus, she not only failed to identify any prior instances of therapy, but actually affirmatively averred that the only time she sought therapy was following the matters at issue in this case. But as DFS eventually learned, plaintiff's discovery responses were decidedly untruthful.

While preparing for plaintiff's initial deposition (held the week before fact discovery closed on April 29, 2016), DFS independently uncovered a federal lawsuit filed by plaintiff in July 2011 wherein she claimed damages for physical injuries and "extreme" psychological and emotional distress arising from a forcible arrest, and ultimately received a $40,000 settlement. Id., Exs. E-F. Plaintiff never disclosed the existence of this lawsuit to DFS, despite its clear responsiveness to the discovery requests described above. Moreover, DFS had also previously requested "[a]ll documents concerning any other complaints of harassment or discrimination….made by Plaintiff against any other person or person(s) from January 1, 2005 through the present." Id., Ex. A at

Request No. 10. The 2011 lawsuit, which included allegations that plaintiff had been subjected to "racially and/or national origin discriminatory treatment," surely constitutes a complaint of discrimination within the relevant time period. Id., Ex. E at ¶¶ 9, 23, 30. Plaintiff nevertheless failed to produce any materials related to the lawsuit and, to the contrary, affirmatively averred that "[t]here are no documents responsive to this request." Id., Ex. C at Response No. 10.

During her initial deposition, after being asked to describe her forcible arrest but prior to being shown her complaint in the 2011 lawsuit, plaintiff was asked whether she had ever had any emotional problems prior to the matters alleged in the instant case. Id., Ex. G at 23:14 – 24:13. She said "No, I have not." Id. She was also asked if she had ever seen any psychiatrists, psychologists or mental health counselors other than Ms. Jamrozek-Burra. Id. at 24:14 – 25:19. She said "No." Id. It was only after being shown her complaint in the 2011 lawsuit, which contained numerous allegations regarding her supposed "extreme" psychological injuries and emotional distress, that plaintiff admitted she had suffered a past episode of emotional distress (which she then claimed lasted for three years). Id. at 51:2 – 53:16. She nevertheless continued to maintain that she had never sought help for this emotional distress. Id. at 54:5-11. But as DFS again eventually learned, plaintiff's response was not truthful.

The day after her deposition concluded, DFS demanded that plaintiff search for and produce all documents and information in her possession, custody and control concerning her forcible arrest and the subsequent lawsuit. Id., Ex. H. Because plaintiff insisted that she had no such documents or information, the Court ordered her to obtain the relevant materials from the attorney who had represented her in the 2011 lawsuit. Id., Ex. I at 10:20 – 17:7. It was only upon reviewing the documents obtained from this attorney that DFS became aware that plaintiff had, in fact, sought therapy following her arrest. Specifically, in her verified interrogatory responses from the 2011 lawsuit, plaintiff stated that she "suffered psychological injury, including but not limited to, depression, anxiety and post-traumatic stress as a direct result of said incident," and "was treated for [her] injuries" at "Advanced Center for Psych, 178 10 Wexford Terrace, Jamaica Estates, New York 11375." Id., Ex. J at Response No. 4. Now armed with the name of the facility, DFS was finally able – in late June 2016 – to obtain plaintiff's past psychiatric records, which included detailed assessments and diagnoses of her mental condition. Id. ¶ 12. Significantly, plaintiff's attorney's files also included a description by plaintiff herself, provided to the other parties in the case, of the extent of her emotional injuries arising from her forcible arrest, which supposedly included three years of "acute fear, severe terror, and intense panic" and months of suicidal thoughts. Id., Ex. K. The allegedly extreme nature of these past mental health problems makes plaintiff's repeated failure to disclose them all the more egregious.

It was the belated discovery of these and other significant materials regarding plaintiff's past mental health history, along with her act of spoliation, that caused the Court to reopen discovery. See Supp. Dietz Decl. ¶¶ 8-10. Thus, if plaintiff had produced these obviously relevant documents and information initially, rather than improperly concealing them, the reopening of discovery would not have been necessary and DFS would not have been forced to incur the additional expense of such reopening. Because this additional expense was the direct result of plaintiff's egregious discovery violations, she should bear the cost thereof. See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 113 (2d Cir. 2002) ("District courts should not countenance 'purposeful sluggishness' in discovery on the part of parties or attorneys and should be prepared to impose sanctions when they encounter it.") (superseded on other grounds); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 134-37 (2d Cir. 1998) (affirming the imposition of attorney's fees as "discovery sanctions for the late production of certain documents" upon finding that the sanctioned parties "had acted in conscious disregard of their discovery obligations" based on a "pattern of behavior which could reasonably be construed as a bad faith effort to thwart plaintiffs' discovery efforts"); Mixon v. Pride & Joy Miami, LLC, No. 13-cv-5534, 2015 U.S. Dist. LEXIS 38998, at *16-17 (S.D.N.Y. Mar. 23, 2015) ("The court has broad authority to impose sanctions for violations of discovery obligations, such as the failure to comply in a timely manner with an appropriate discovery request" including "shifting of costs, including attorneys' fees, incurred by the other parties in connection with the discovery violation"); Kosher Sports, 2011 U.S. Dist. LEXIS 86651, at *44-45 ("The Court is mindful of the need to deter future discovery violations and to ensure that defendant is made whole for any loss resulting from plaintiff's discovery abuses. As a result of the delayed production of the tapes, the defense was constrained to reopen several depositions, likely at considerable expense. Accordingly, the Court will require plaintiff and plaintiffs' counsel to reimburse defendant for 'the reasonable expenses, including attorney's fees, caused by the violation.'") (quoting Fed. R. Civ. P. 26(g)).[3]

CONCLUSION

For the foregoing reasons, as well as those set forth in its moving and supplemental papers, DFS respectfully requests that the Court sanction plaintiff's spoliation by dismissing her claim against DFS (or, at the very least, by imposing an adverse inference). DFS further requests that it be awarded the costs, including attorney's fees, incurred in making the instant spoliation motion and conducting reopened discovery.

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[3] It should be noted that the concealment of documents and information related to her past mental health history is consistent with plaintiff's pattern and practice of obfuscation in this case. She similarly failed to produce – and even denied the existence of – other obviously relevant materials. During her deposition, for example, plaintiff denied creating and sending multiple drafts of an email regarding DFS's investigation of defendant Guevara until confronted with the drafts themselves. See Reply Dietz Decl, Ex. G at 219:10 – 220:13. Significantly, plaintiff never produced those drafts despite their clear relevance to this case; instead, the drafts only came to light via DFS's own document production even though they were written by plaintiff and therefore clearly in her possession. Plaintiff similarly failed to produce other relevant documents she authored, most notably a contemporaneous email in which she expressed appreciation for her supervisors' handling of the situation with Guevara, a sentiment which stands in direct opposition to her position in this case. Id., Ex. L. Like her deletion of the recording at issue in this motion, it is evident that plaintiff produced only those materials she believes are helpful to her case, and withheld (or even destroyed) anything else. Indeed, plaintiff's less-than-forthcoming conduct in this matter has been so untenable that her own expert ultimately withdrew his report and refuses to testify on her behalf. Id., Ex. M.

Dated: New York, New York
January 5, 2017

Respectfully submitted,

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